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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1013

ORIENT MID-EAST LINES, INC. and ASTRONATO CIA NAV. S.A.,

Petitioners,

against

A SHIPMENT OF RICE NOW OR LATELY ON BOARD THE SS ORIENT TRANSPORTER,

and

THE REPUBLIC OF VIETNAM, TONG CUOC TIEP TE (General Supply Agency) and CONG-TY BAO HIEM TAI BAO HIEM VIETNAM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of Case	4
Reasons for the Writ	6
1. Conflict between the Circuits	6
2. The Importance of the Question	9
3. Other Errors of the Court	10
Conclusion	11
APPENDIX:	
A—Opinion of U.S. District Court for Southern District of Texas, Beaumont Division, dated March 20, 1973	A1
B—Opinion of Fifth Circuit Court of Appeals dated June 27, 1974	A21
C—Judgment of the Fifth Circuit Court of Appeals entered June 27, 1974	A39
D—Order of Fifth Circuit Court of Appeals denying Petition for Rehearing dated November 19, 1974	A41

Cases Cited

	PAGE
Director General of the India Supply Mission v. *The SS Maru*, 459 F.2d 1370 (2d Cir. 1972)	8
Firestone Synthetic Fibers Co. v. *M/S Black Heron*, 324 F.2d 835 (2d Cir. 1963)	7, 8
Horn v. *Cia de Navigacion Fruco, S.A.*, 404 F.2d 422, 432 (5th Cir. 1968), cert. denied, 394 U.S. 943, 89 S.Ct. 1272 (1969)	7
May v. *Hamburg-Amerikanische Packetfahrt Aktiengesellschaft (The Isis)*, 290 U.S. 333, 54 S.Ct. 162 (1933)	9
Silvia, The, 171 U.S. 462, 19 S.Ct. 7 (1898)	11
Wilbur-Ellis Co. v. *M.V. Captayannis S.*, 306 F. Supp. 866, aff'd 451 F.2d 973 (9th Cir. 1971) cert. den., 405 U.S. 923, 92 S.Ct. 962 (1972)	8

Other Authorities

Gilmore & Black, *The Law of Admiralty*, (1957)	9
Prosser, W., *The Law of Torts*, (1971)	11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on June 27, 1974, and the order denying a Petition for Rehearing on November 19, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 496 F.2d 1032, appears in Appendix B hereto. The memorandum opinion and findings of fact and conclusions of law rendered by United States District Judge Joe J. Fisher in the United States District Court for the Southern District of Texas, Beaumont Division, unreported, is printed in Appendix A hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 27, 1974. A timely Petition for Rehearing was filed and was denied on November 19, 1974, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28, U.S. Code § 1254(1).

Questions Presented

1. The first question presented in this Petition is whether the United States Court of Appeals for the Fifth Circuit has erred in construing the United States Carriage of Goods by Sea Act, approved April 16, 1936, Title 46, U.S. Code § 1300, *et seq.*, as requiring a shipowner to prove an absence of unseaworthiness as a cause of the loss in addition to proving that a loss falls within the exception of "act, neglect or default of * * * the servants of the carrier * * * in the management of the ship," the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Ninth Circuit having held that once the carrier has brought forth evidence establishing a defense of error in management, the burden is on the shipper to show that the ship was unseaworthy and that the damage was caused by such unseaworthiness.

2. The second question presented in this Petition is whether the United States Court of Appeals for the Fifth Circuit has erred in holding that there were concurrent causes of the loss in this case.

3. The third question presented in this Petition is whether the United States Court of Appeals for the Fifth Circuit has erred in holding that the SS "Orient Transporter" was unseaworthy at the commencement of the voyage.

Statutory Provisions Involved

The United States Carriage of Goods by Sea Act, Title 46 U.S. Code §§ 1304(1) and 1304(2)(a):

> "(1) Unseaworthiness.
>
> Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, • • •. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.
>
> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; • • •"

The Harter Act, Title 46 U.S. Code § 192:

> "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly

manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel * * *."

Statement of Case

This is a suit in Admiralty brought to recover a General Average contribution from cargo carried on board the SS "Orient Transporter" on a voyage from U.S. Gulf ports to ports in South Vietnam. The vessel had been chartered by the petitioners to Commodity Credit Corporation of the United States Department of Agriculture, acting on behalf of the South Vienamese Government. The cargo involved was 10,000 long tons of rice. Under the charterparty and bills of lading issued thereunder, the shipment was subject to the United States Carriage of Goods by Sea Act. The charterparty and bills of lading also contained a "Jason Clause" which provided that in the event of any "accident, danger, damage or disaster", "for the consequences of which the carrier is not responsible by statute, contract or otherwise", the cargo shall contribute with the carrier in General Average.

After loading the rice at Mobile, Alabama and Beaumont, Texas, the vessel underwent some boiler repairs while lying aground in the Neches River, the port authorities of Beaumont having required her to leave her loading berth. The vessel had some difficulties in getting out of her position aground on the river bottom, and suffered some damages which required her to return to Beaumont for repairs. After the repairs were made, the "Orient Transporter" sailed from Beaumont for Vietnam on June 14, 1970.

On June 21, 1970, after having been at sea for a week, the engineer on watch was advised by his fireman that the

fireman could not see the level of water in the boiler. The engineer on watch hurried to the vicinity of the boiler and found that he could not see the water level either. He tried to blow down the gauge glass, but he still could not see whether the boiler had too much or too little water. The opinion of the Fifth Circuit Court of Appeals describes what happened next, 496 F.2d 1037 (App. p. A27):

> "• • • Fearing an explosion, he turned on the boiler water feed pump and fed cold water directly into the boiler. The results were catastrophic for the Orient Transporter. About a minute later loud noises came from the engine room, strong vibrations shook the vessel, and steam rose from the main engine. The water in the boiler, already high before Spetsiotis turned on the feed pump, had 'carried over' into the turbines. The blades of the high pressure turbine were destroyed, and the turbine was rendered inoperative. • • •"

The damage to the main engine was so severe that the "Orient Transporter" was unable to proceed further under her own power. A salvage tug was retained to tow the vessel to the Panama Canal. After being surveyed there, it was determined that a new turbine was required. Later it was determined that repair of the vessel would be uneconomical. The ship with her cargo on board was towed to Beaumont. At Beaumont, the cargo was discharged and the voyage terminated.

A General Average was stated and this suit was brought against the cargo to recover the cargo's proportion of General Average expenses arising out of the events of the voyage.

The shipowner's claims for General Average cover two incidents, the first of which was the grounding in the Neches River, and the second of which was the complete destruction of the vessel's turbine as a result of the acts of

Engineer Spetsiotis. The Fifth Circuit Court of Appeals denied recovery to the shipowner for both General Average claims. The Court's decision on the General Average claim arising out of the grounding in the Neches River is not part of this Petition. On this Petition for Certiorari, Petitioners seek only to review the Court's decision on the General Average claim arising out of the destruction of the vessel's turbine.

The Court of Appeals for the Fifth Circuit held that no recovery should be permitted to the owner on this claim because the shipowner had not met his burden of proof. The Court held that although the immediate cause of the accident had been the negligence of the engineer on watch, Spetsiotis, the incompetence of the fireman and the lack of an oiler amounted to "unseaworthiness" which had formed a crucial link in the chain of causation, and the shipowner had not proven that the negligence of the engineer was more than a concurring cause of the accident. Holding that the burden is on the shipowner to show the absence of unseaworthiness as a cause of the loss and that the shipowner in this case did not meet that burden, recovery of General Average was denied.

Reasons for the Writ

1. Conflict between the Circuits.

This decision of the Fifth Circuit Court of Appeals conflicts with decisions in both the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals with regard to an important point under the U.S. Carriage of Goods by Sea Act. The point is whether the carriers, relying upon a defense of an error in managment, 46 U.S. Code § 1304(2)(a), *supra*, p. 3, must go further after proving that the loss was caused by an error in management on the part of one of the crew members and prove that the loss could not have been caused by the unseaworthiness of the vessel.

The Fifth Circuit has said in this case, 496 F.2d 1032, at p. 1041 (Appx. A35):

> "At best the appellants showed that Spetsiotis's action, and perhaps negligence, was a concurrent cause of the catastrophe. • • • We have held that the burden of showing that the damage is due to a cause other than unseaworthiness falls on the shipowner. Horn v. Cia de Navigacion Fruco S.A., 404 F.2d at 432; • • •."

In *Horn* v. *Cia de Navigacion*, cited as authority, the Fifth Circuit Court of Appeals stated at 404 F.2d 432:

> "• • • Whether the link of the causal chain is manifested by the numerical inadequacy of the crew, or in the want of proper training and instruction is not material, since the owner has failed to carry its burden of proving an absence of causation between the unseaworthiness and loss. • • •"

It is this placing of the burden of proving "an absence of causation" on the shipowner which conflicts directly with decisions in the Second Circuit and the Ninth Circuit.

The same point came before the Second Circuit Court of Appeals in *Firestone Synthetic Fibers Co.* v. *m/s Black Heron*, 324 F.2d 835 (2d Cir. 1963). In that case, a vessel had a clogged vent pipe in one of her tanks which required the ship's crew to fill the tank through another vent. In doing so, the hose was inserted in the wrong vent which damaged the cargo. The Court said, 324 F.2d 836:

> "Under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(2)(a) (1958), the defense of error in management is not conditioned, as it is under the Harter Act, 46 U.S.C. § 192 (1958) on a showing of seaworthiness or due diligence to make the vessel seaworthy. Isbrandtsen Co. v. Federal Ins. Co., 113 F. Supp. 357

(S.D.N.Y. 1952), aff'd per curiam, 205 F.2d 679 (2d Cir.), cert. denied, 346 U.S. 866, 74 S.Ct. 106, 98 L.Ed. 377 (1953). Therefore once the carrier has brought forth evidence establishing the defense of error in management the burden is on the shipper to show that the ship was unseaworthy and that the damage was caused by such unseaworthiness. See Isbrandtsen Co. v. Federal Ins. Co. supra."

In *Director General of India Supply Mission* v. *s/s Maru*, 459 F.2d 1370 (2d Cir., 1972), a case involving a stranding, it was proven that the ship did not have adequate charts on board. The Court granted the shipowner the defense of an error in navigation stating as follows regarding the burden of proof at page 1372:

> "• • • Where the carrier has brought itself, as in this case, within the excepted peril of negligent navigation, the burden then shifts to the cargo owner to establish that the unseaworthiness caused the damages sought."

The Ninth Circuit Court of Appeals follows the Second Circuit in holding that the burden of proving that unseaworthiness must be the cause of the loss falls upon the cargo. *Wibur-Ellis Co.* v. *m/v Captayannis S.*, 306 F. Supp. 866, affirmed 451 F.2d 973 (9th Cir. 1971). In that case, the District Court said at 306 F. Supp. 871:

> "The right of shipowner to exoneration from liability under Section 4(2)(a) of the Carriage of Goods by Sea Act is, unlike the Harter Act, not conditioned on a showing that due diligence was used in making the vessel seaworthy and properly manned before and at the beginning of the voyage."

The Fifth Circuit does not seem to have realized that the Carriage of Goods by Sea Act itself places the burden

of proof of unseaworthiness as the cause of the loss on the cargo interests. Section 4(1), 46 U.S. Code § 1304(1) *supra,* provides that neither the carrier nor the ship shall be liable for unseaworthiness unless caused by a want of due diligence on the part of the carrier to make the ship seaworthy, and then provides further:

> "*Whenever loss or damage has resulted from unseaworthiness,* the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section." (Emphasis supplied.)

The above-quoted portion of the statute places no burden of proof on the carrier until it has first been shown that the loss or damage "*has resulted* from unseaworthiness". (Emphasis supplied.) Proof of unseaworthiness as a cause of the loss is a burden which falls on the cargo owner as the Second and Ninth Circuits have properly held.

2. The Importance of the Question.

Under the predecessor of the Carriage of Goods by Sea Act, the Harter Act, 46 U.S. Code § 192, *supra,* p. 3, this Court held that a shipowner could not rely upon a defense of an error in management until it had first been proven that the owner had exercised due diligence to make the vessel in all repects seaworthy. *May* v. *Hamburg-Amerikanische Packetfahrt Aktiengesellschaft (The Isis),* 290 U.S. 333, 54 S.Ct. 162 (1933).

The U.S. Carriage of Goods by Sea Act exemption of error in management, 46 U.S. Code § 1304(1)(a), *supra,* is not stated in conditional form as is the Harter Act exemption, 46 U.S. Code § 192, *supra,* therefore the rule of the *Isis* is no longer applicable. Gilmore and Black, *The Law of Admiralty,* (1957), p. 134.

If the rule adopted by the Fifth Circuit in this case is correct, and the rule followed in the Second Circuit and

the Ninth Circuit are incorrect, then a shipowner is placed back into a position similar to that which used to apply under the Harter Act. He must prove the loss was not caused by unseaworthiness before he can take advantage of the exceptions of error in navigation or management.

Every time that a shipowner proves a negligent act on the part of a crew member, the competence of that crew member inevitably comes into question. Under the rule in this case, a shipowner who relies on the defense of error in management, must not only prove that the accident occurred because of the negligence of a crew member, but must go further and prove that the crew member was not incompetent at the time of the commencement of the voyage or that his incompetence, if any, could not have caused or contributed to the loss. This is a question which is important to all litigants under the U.S. Carriage of Goods by Sea Act. It has not been passed upon by this Court since the Act was passed.

3. Other Errors of the Court.

The Fifth Circuit Court of Appeals found the vessel to be unseaworthy at the commencement of the voyage upon evidence of errors on the part of the fireman at the time of the accident and other circumstances at the time of the accident. There was no evidence to show what experience or training the fireman had at the time the vessel sailed from her loading port or the competency of the other members of the engine room staff at that time. It is because of this lack of evidence of the competence or incompetence of the crew at the time of sailing that the Court fell back upon the burden of proof. It is apparent from a reading of the Court's opinion that if it had placed the burden of proving unseaworthiness at the commencement of the voyage on the cargo interests, it would have held that the cargo interests failed in their burden of proof.

The Court recognized that, "The inexperience of a crew member does not, of course, necessarily create an unsea-

worthy condition. Properly supervised, an inexperienced, untrained individual may learn to become competent." 496 F.2d 1040 (App. A33). This statement is in accordance with the decision of this Court in *The Silvia*, 171 U.S. 462, 19 S.Ct. 7 (1898). In that case, it was held not to be unseaworthiness for a vessel to sail with an open porthole, provided the porthole could be closed by the crew after sailing. Likewise, if a vessel sailed with an inexperienced, untrained crew member and failed to teach that crew member his job, it would be an error in the management of the ship, not unseaworthiness.

The Fifth Circuit Court of Appeals also erred in its holding that the negligence of the engineering officer and the "unseaworthiness" of the fireman were "concurrent" causes of the loss. At the time of the accident, the engineering officer had completely taken over control of events and his negligence was an intervening cause, not a concurrent cause. W. Prosser, *The Law of Torts*, (1971) pp. 239, 271.

CONCLUSION

A Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Dated: New York, N. Y., February 10, 1975.

Respectfully submitted,

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APPENDIX A--DECISION OF DISTRICT COURT

437

[568]

MEMORANDUM OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Caption Omitted)

(Filed Mar. 20, 1973)

This is a case of an admiralty and maritime claim within the meaning of Rule 9 (h), Federal Rules of Civil Procedure. The Plaintiff seeks to recover amounts allegedly owed in general average to them by the Defendants, which general average acts alleg

[569]

edly occurred on or about June 6, 1970 and June 21, 1970 during the course of a voyage carrying the In Rem Defendant cargo of rice from Beaumont to South Vietnam. The Plaintiffs allege that they are owed these amounts under the general maritime law, the charter agreement, the bills of lading, and under the laws of the general average. The Defendants and Counter-Claimants, on the other hand, state that the damages incurred to the Plaintiffs are not as a result of a general average act; that the Plainiffs did not perform the duties required of them; and in addition, have counterclaimed for damages sustained by them as a result of Plaintiffs' inability to perform under the charter party.

438

The Court having heard the evidence and considered the stipulations of the parties herein entered, the arguments of counsel, and having reviewed the briefs, makes the following Findings of Fact and Conclusions of law.

1.

The Plaintiffs are corporations organized and existing under the law of Panama, and Plaintiff, Orient Mid-East Lines, Inc. owns all of the stock of the other Plaintiff. Plaintiffs are represented in the United States by Eagle Ocean Transport, Inc., with an office and place of business at 29 Broadway, New York, New York.

2.

Claimants, Defendants, and Counter-Claimants are corporations or government organizations organized and existing under and by virtue of the laws of the Republic of South Vietnam.

3.

On April 15, 1970, Orient Mid-East Lines, Inc. described as "disponent owners", chartered the ORIENT TRANSPORTER, a vessel built in 1949, to load at one to three safe Gulf ports a full and complete cargo of 10,000 long tons of rice for delivery at one to three ports in South Vietnam. In Clause 1 of the charter party, the vessel was warranted to be tight, staunch and strong and in every way fitted for the voyage. Clause 7 of the charter party incorporated the United States Carriage of Goods by Sea Act, 46

439

U.S.C. Sec. 1300 et seq. Clause 8, known as the Jason Clause, provided that cargo would contribute its proportionate share of the General Average expenses when an accident was caused by an act for which the vessel owner would not be responsible by statute, etc. The pertinent provisions of Clause 8 are as follows:

[570]

> "In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible by statute, contract or otherwise, the goods, consignees or owners of the goods shall contribute with the carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred in respect of the goods."

By Clause 9 of the charter party, General Average was to be payable according to the York/Antwerp Rules, 1950, and was to be settled in New York.

4.

The cargo of rice was loaded under the said charter party, partly at Mobile, Alabama, and partly at Beaumont, Texas. Three Orient-Mid East Lines, Inc. form bills of lading were issued when the cargo was loaded on the ship. The bill of lading issued at Mobile, dated May 21, 1970, acknowledged receipt of 100,000 bags of rice weighing 100 lbs. per bag. Two bills of lading issued at Beaumont, Texas, were dat-

440

ed May 27 and June 5, 1970, and acknowledged receipt of 101,963 and 27,000 bags of rice weighing 100 lbs. per bag.

5.

The Mobile and Beaumont bills of lading contained the same provisions set forth in Clauses 7, 8 and 9 of the charter party. The bills of lading incorporated the United States Carriage of Goods by Sea Act, 46 U.S.C., Sec. 1300 *et seq.;* bill of lading Clause 14 incorporated the Jason Clause; and bill of lading Clause 15 incorporaed the applicability of the York/Antwerp Rules, 1950.

6.

In May, 1970, the ship loaded cargo in the Mediterranean and set sail for the U.S. Gulf. On this voyage, the ship experienced.

[571]

problems with salt in her boilers. After arrival at Mobile, the ship's starboard boiler was repaired by Bender Welding and Machine Company, Inc. for a total amount of $16,026.00 (Plaintiffs' Exihibit 13.). Lloyd's surveyor inspected the repairs and issued a certificate dated May 27, 1970, stating that the repairs to the starboard boiler had been carried out satisfactorily and that repairs to the port boiler could be delayed, (Plaintiffs' Exhibit 14).

7.

Work was to be done in Beaumont, Texas, to make

the port boiler fit for the voyage. On Saturday, June 6, at 0600, all cargo had been put on board and the vessel was prepared for sailing. At this time, no repairs had been accomplished on the port boiler. This boiler work was necessary to make the ship reasonably fit and ready to go to sea, and the ship could not have gone to sea without this work being done on the port boiler.

8.

The vessel proceeded down the Neches River to an anchorage where it was intentionally placed in the soft mud of the anchorage. The vessel, as placed by the Captain and the pilot, was not in any position of peril and was in a safe anchorage. Thereafter, later in the day, with the port boiler still not in a condition to safely proceed to sea, attempts were made to remove the vessel from anchorage. Due to the utter confusion in the engine room and the lack of power on the vessel, the vessel was not removed and returned to the dock in Beaumont until noon on June 7.

9.

During this entire time, however, neither the vessel nor its cargo was in peril or in any danger. Damages that were sustained were the result of the engine department or members thereof being incompetent so as to make the vessel not reasonably fit, and the power equipment of the vessel being not reasonably fit. In

[572]

addition, the Plaintiffs failed to use due diligence to make them reasonably fit, and the owners failed to use due diligence to properly man and equip the vessel.

10.

The vessel returned to the dock in Beaumont for the purpose of making necessary repairs to the boilers so as to make them reasonably fit, the majority of which work was necessary prior to the vessel having left on June 6.

11.

During its stay in Beaumont, the vessel had a crew of 30 men (See Plaintiffs' Exhibit 39, Page 178, 180) and of this, the engine department consisted of a Chief Engineer, three Third Engineers, an Oiler, three Firemen and a Wiper. Prior to the vessel leaving on June 14, one Fireman, Skarlis Vassilios, was removed to the hospital. Second Engineer Koutroufini was fired for incompetence. In adition, at 1850, just prior to leaving, two oiler, Venizelakos and Kapodistrian (Kapcustrias), and Fetaxidis, a wiper, were absent. There is no evidence of any additional seaman joining the vessel. At the time the vessel left the pier on the journey, June 14, at 1934 hours, the engine department, therefore, was short at least one Fireman, two Oilers, and a Wiper.

12.

The engine room, as it was so manned, was not

443

reasonably fit for its intended purpose nor had the vessel used due diligence to make it reasonably fit.

13.

Subsequently, on Monday, June 15, as the vessel was leaving the Sabine bar, the pilot disembarked, and at 0225, the Wiper, Fetaxidis and the Oiler, Venizelakos, were returned by the police. The Oiler, Kapodistrian was declared a deserter. During his absence, Fetaxidis had been signed off as a Wiper and signed on as a Fireman.

[573]

14.

The vessel subsequently proceeded on her voyage to Vietnam by way of Panama. During the next five days, the vessel had to stop its engine twice because of mechanical difficulties, and on Sunday, June 21, at 2110 hours, the vessel was rocked by strong vibrations. At this time, Fetaxidis was the Fireman/Water tender on watch, and a Third Mate, sailing as second Mate, by the name of Spetsiotis, was the Engineer on watch. Fetaxidis was a young, inexperienced boy, with no record of any formal training for his job and almost no evidence of any informal training. From the description of his duties as Fireman/Water tender, it is the determination of the Court that he was not reasonably fit for his job as Fireman/Water tender.

15.

Just prior to the casualty, Spetsiotis, the Engineer,

444

was in the lower engine room changing oil in the lub oil pump. On a vessel with a full engine complement, this would have been the job of another man other than the watch engineer, who should have been, at the time, in close proximity to the young fireman/Water tender to observe his performance. Just prior to the casualty, the young, inexperienced Fireman/Water tender became unable to determine the level of water in the boiler. This was a dangerous situation, for if there is no water in the boiler, the boiler will explode, and if there is too much water in the boiler, the water will "carry over" and ruin the turbines.

16.

Fetaxidis left his post and went and found the Engineer, Spetsiotis, and they both returned to the Fireman/Water tender's station. At this time, the Fireman/Water tender could not tell the Engineer what valves were open what water he was feeding into the system, nor any other particulars which he should have known to be reasonably competent for his job. The Engineer attempted to make

[574]

a determination of the level of the water, but because there was only one water level indicator on board, he could not promptly do this, so, he elected to add water to the system to prevent the greatest danger, that is, the boilers exploding. Unfortunately he made the wrong move, as the Firemen/Water tender had previously opened an additional valve

to allow water into the system. This caused a "carry over of the boiler water into the turbines, which completely destroyed most of the turbine blades causing the vessel to lose all power.

17.

At the time the vessel left the port and prior to the casualty of June 20, the vessel was not reasonably fit because of (1) the inexperience of the Fireman/Water tender, Fetaxidis; (2) the inadequate manning in the engine room; and (3) the lack of equipment on board. Nor did the owners use due diligence to make the vessel seaworthy and reasonably fit prior to the vessel's leaving the port, and this failure to use due diligence to make the vessel seaworthy was the cause of the casualty that occurred to the vessel on June 20 and the subsequent expenses that were incurred.

18.

It is the Plaintiffs' contention that the accident of June 21 was because of the negligence of the Fireman/Water tender, Fetaxidis, and/or the alleged negligent action of Spetsiotis turning water into the boiler causing a "carry over". As we have determined that the cause of the accident was the unseaworthiness of the vessel due to its inadequate manning and the owner's failure to use due diligence to properly man and equip the vessel, it is not necessary to determine whether or not these actions on the part of the crew in this emergency were negligence.

446

19.

The Chief Engineer conferred with the Captain concerning the extent of the damage to the ship. They decided that the ship

[575]

could not proceed under her own power and that it would be necessary to engage a salvage tug. After some delay, the Tug NEPTUNIA came along side and towed the ORIENT TRANSPORTER to the Panama Canal. The ORIENT TRANSPORTER arrived at Cristobal on June 27 and remained at the Panama Canal until July 26, 1970. Surveys were held, and it was determined that it would be impossible to repair the HP turbine at the Panama Canal. Accordingly, the ORIENT TRANSPORTER was towed back to Beaumont where she arrived on August 7, 1970.

20.

On arrival at Beaumont, consideration was given to repairing the HP turbine. Several repair facilities were consulted, and it was determined that the repairs would cost approximately $336,000 and that repairs could not be completed for many months. The projected delay in repairing the ship was due to the necessity for constructing a new HP turbine in Germany. Because of the delay, the cargo interest decided that the rice must be transshipped. The rice was discharged between August 12 and August 27, 1970. When the discharging commenced, the Plaintiffs notified Commodity Credit Corpora-

447

tion that they considered the charter party frustrated. On August 27, 1970, the ORIENT TRANSPORTER was removed to lay berth and all of the crew members were signed off. Finally, on October 1, 1970, the ORIENT TRANSPORTER was sold for scrap for the amount of $73,360.00.

21.

Plaintiffs filed their libel in rem against the cargo in August, 1970, and the cargo was seized by the U.S. Marshal. The cargo was thereafter released to the Commodity Credit Corporation from the seizure after appropriate security had been arranged by the Commodity Credit Corporation.

22.

Defendants and counter-claimants herein did not file any pleadings until February 1, 1972. This Answer reserved the right to

[576]

file a counter-claim at some later date. On September 11, 1972, Defendants filed an Amended Answer and Counterclaim consisting of claims for fumigation charges, unloading expenses, inspection expenses, pier demurrage, additional freight, damage and shortage of the rice, and the amounts for salvage which Defendants have been required to deposit in London arbitration.

448

23.

Plaintiffs thereupon filed Answer to the Counterclaim setting up as an affirmative defense the one year statute of limitation contained in 46 U.S.C., Sec. 1303 (6). Plaintiffs asserted that all of the matters listed in the Counterclaim were time-barred under the United States Carriage of Goods by Sea Act with the exception of Defendants' claim for the amounts they had to pay in London arbitration.

24.

For purposes of General Average, the average adjuster found that the contributing value of the ORIENT TRANSPORTER was $71,443.95 by deducting from the sales price the cost of shifting to the lay berth prior to the sale. The average adjuster also found that the contributing value of the rice was $1,596,025.08. This figure was based on the letter dated June 8, 1971, to the average adjusters by the U.S. Department of Agriculture; Commodity Credit Corporation stated that the sound value of the rice was $1,599,837.56; however, after deductions, the total value of the rice for the purpose of General Average contribution was $1,596,025.08 (Plaintiffs' Exhibit 39, p. 84).

25.

Based on the losses and allowance and the contributing values of the ship and cargo, the average adjuster further found that the total amount of general average due from cargo was $181,719.57.

449

[577]

Cargo was given a credit in the amount of $63,688.79 for the proportionate share of the salvage award and associated expenses which cargo had been required to pay in London arbitration (Plaintiffs' Exhibit 39, pp. 190, 191).

DAMAGES

26.

Should General Average apply, the damages as correctly stated in the General Average Statement that the Plaintiffs would be entitled as general average expenses the sum of $8,605.62 for the occurrence of June 6 and 7, and $173,113.95 as the correct amount for the occurrence of June 21, 1970. Interest should run on these amounts from the date of the General Average Statement, that being March 13, 1972, at the rate of 6%.

27.

Claimants, Defendants and Counter-Claimants have been damaged in the following particulars: They have been required to pay the sum of $61,933.99 in January of 1972, as their share of the salvage award rendered in favor of Overseas Towage and Salvage Company, Ltd. by Mr. G. A. R. Darling on December 17, 1971 in London, England. They are entitled to the sum of $1,754.80 on this amount as interest from the time paid until the time of the Average Statement on March 13, 1972.

450

28.

In addition, the U.S. Department of Agriculture and the Commodity Credit Corporation expended certain sums for the offloading of the rice in Beaumont, Texas, when the voyage was abandoned. The Defendants have been charged with these amounts by the Commodity Credit Corporation and the Commodity Credit Corporation has been reimbursed for these amounts, as a result of the abandonment of the voyage by the Plaintiffs herein:

[578]

a) Big State Exterminating Company, for fumigating rice on Board the SS ORIENT TRANSPORTER in Beaumont, Texas, on August 10, 1970—$4,800—The Commodity Credit Corporation was reimbursed by the Defendants herein on September 8, 1970;

b) Shane's Termite Pest Control, for fumigation of the rice taken from the SS ORIENT TRANSPORTER, in the sheds on the 6th and 7th in Beaumont, awaiting re-shipment—$4,500—reimbursed by the Defendants herein to Commodity Credit Corporation on October 21, 1970;

c) The Port of Beaumont, fumigating 222 bags of rice from the SS ORIENT TRANSPORTER—$29.00—The Commodity Credit Corporation was reimbursed by the Defendants on October 21, 1970;

d) James J. Flanagan Stevedores for discharging the cargo of rice from the SS ORIENT TRANSPORTER as follows:

451

Discharging the rice	$53,364.22
Detention, time labor	2,679.69
Extra labor	876.85
Total	$62,582.01

which amount was paid by the Government of Vietnam to the Commodity Credit Corporation on November 16, 1970;

e) Consumer and Marketing Service, U. S. Department of Agriculture, for inspection of cargo, bags of rice, as it was unloaded from the SS ORIENT TRANSPORTER at Beaumont, Texas, in August—$781.00, which amount was repaid by the Government of Vietnam to Commodity Credit Corporation on November 3, 1970;

[579]

f) Consumer and Marketing Service, U. S. Department of Agriculture, for inspection fees and related commodity examination certificates performed on the dock and for the loading on board the forwarding ship—$312.40, which amount was paid by the Defendants to Commodity Credit Corporation on December 3, 1970;

g) Consumer and Marketing Service, U. S. Department of Agriculture, Fruit and Vegetable Division, for inspection to determine the fitness for sale, for animal consumption of small parcel of bag of rice removed from the SS ORIENT TRANSPORTER on September 8, 1970—$30.00 which amount was reimbursed by the Government of Vietnam to

452

the Commodity Credit Corporation on December 18, 1970;

h) The Port of Beaumont, demurrage for storage of cargo, discharged from the SS ORIENT TRANSPORTER from August 27, 1970 to October 24, 1970 —$26,895.56, which amount was paid by the Government of Vietnam to the Commodity Credit Corporation on March 31, 1970;

29.

In addition, Defendants claim losses resulting from a shortage of rice, as well as rice damaged in offloading. In damaged rice, there was 222 bags of reasonable value of $1,554.00 less salvage of $177.60. In addition, there were 359 bags of lost rice of a reasonable value of $7.00 a bag, for a total of $2,504.00. In addition, the Defendants were required to pay an additional cost to re-ship the rice on the SS SIMOA which cost was a total of $513.00.

[580]

30.

The Court finds that the charter party contract entered into between the Plaintiffs and the Commodity Credit Corporation was not completed due to the unseaworthiness of the vessel and because of the failure of the Plaintiffs to use due diligence to make the vessel seaworthy and to properly man and equip the vessel.

453

31.

The Court finds that the goods were not delivered under the bills of lading to the consignee because of the unseaworthiness of the vessel and the failure of the Plaintiffs to use due diligence to make the vessel seaworthy, and the failure of the Plaintiffs to us due diligence to properly man and equip the vessel.

32.

The counter-claim for the amounts paid for salvage is one for indemnification arising from the Plaintiffs' violations of their duty of due diligence imposed on them by law and the charter contract. The counter-claimant is entitled to recover from the Plaintiffs the sum of $61,933.99 plus interest of $1,-754.80 through March 13, 1972, and additionally, interest on the $61,933.99 amount from March 13, 1972.

33.

The counter-claim for amounts paid by defendants to the Commodity Credit Corporation for the costs of unloading and storing the rice, for the additional costs of re-shipping the cargo, and for the loss and damage to the cargo are time-barred under the one year Statute of Limitations and, therefore, the Defendants, are not entitled to recover for such claims.

454

[581]

CONCLUSIONS OF LAW

1.

That on or about June 6 and June 21, 1970, the ORIENT TRANSPORTER was unseaworthy.

2.

The Plaintiffs failed to use due diligence to properly man and equip the vessel or to make it seaworthy.

3.

The occurrences which took place on or about June 6 and June 21, 1970 were caused by the unseaworthiness of the vessel and the failure of the owner to use due diligence to make the vessel seaworthy and to properly man and equip the vessel.

4.

Due to the foregoing conclusions, the Plaintiffs are not entitled to recover on either of their claims for General Average.

5.

Defendants are to be indemnified with respect to the salvage paid as a consequence of the London arbitration.

455

6.

Defendants and counter-claimants are not entitled to recover for the loss on damaged cargo, the costs of off-loading, fumigation, inspection, storage, or the additional costs of re-shipment as such claims are barred by the one year Statute of Limitations.

7.

Judgment shall be entered in favor of the Defendants and counter-claimants to recover of the Plaintiffs, jointly and severally, the sum of $61,933.99 plus interest of $1,754.80 through March 13, 1972, and additionally, interest on the $61,933.99 amount from March 13, 1972, at the rate of six (6%) percent.

DONE at Beaumont, Texas, this 20th day of March, 1973.

JOE J. FISHER
United States District Judge

[582]

JUDGMENT

(Caption Omitted)

(Filed March 20, 1973)

THIS ACTION came on to be tried before the Court and evidence introduced by the parties having been heard and the Court having made its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED and DECREED that the Defendant-Counter-claimant have and recover of the from the Plaintiffs jointly and severally, the sum of $61,933.99 plus interest of $1,754.80 through March 13, 1972, and additionally, interest on the $61,933.99 amount from March 13, 1972, at the rate of Six (6%) percent and their costs incurred.

Dated this the 20th day of March, 1973.

JOE J. FISHER
United States District Judge

APPENDIX B--OPINION OF COURT OF APPEALS

5085

ORIENT MID-EAST LINES, INC. and Astronato Cia. Nav. S. A., as interest may appear, Plaintiffs-Appellants-Cross Appellees,

v.

A SHIPMENT OF RICE now or lately ON BOARD the S S ORIENT TRANSPORTER, In Rem, and The Republic of Vietnam, Tong Cuoc Tiep Te (General Supply Agency) and Cong-Ty Bao Hiem Tai Bao Hiem Vietnam, Defendants-Appellees-Cross Appellants.

No. 73–2096.

United States Court of Appeals, Fifth Circuit.

June 27, 1974.

Shipowners filed action in rem against cargo of rice, seeking general average contribution for damage sustained by ship in two different incidents. Cargo interests counterclaimed for expenses incurred after ship lost her propulsion system through destruction of high pressure turbine and also counterclaimed for recovery of deposit paid as cargo's general average share of salvage expenses incurred in towing ship back to port. The United States District Court for the Eastern District of Texas, Joe J. Fisher, Chief Judge, entered judgment against plaintiffs on their general average claims, for defendants on their salvage expense counterclaim, and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that (1) plaintiffs were not entitled to contribution in general average for damage to ship and other expenses arising out of grounding incident and destruction of turbine, where ship was unseaworthy in both instances, and (2) Carriage of Goods by Sea Act's one-year statute of limitations did not apply to cargo interests' claim for reimbursement of

salvage deposit, but it did apply to and barred their action to recover expenses and losses borne after the disabled ship was towed back to port.

Affirmed.

5089

Appeals from the United States District Court for the Eastern District of Texas.

Before RIVES, WISDOM and MORGAN, Circuit Judges.

WISDOM, Circuit Judge:

[1–3] Damage sustained by the S.S. Orient Transporter draws us into the esoteric world of "general average", the ancient maritime doctrine that "loss for the common benefit which is incurred by one who partakes in a maritime venture should be shared ratably by all who participate in the venture". Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co., D.Md.1967, 274 F.Supp. 884, 891. General average may go back to the Phoenicians, but undoubtedly it was practiced in Rhodes at least as early as 300 B.C., and was accepted throughout the Mediterranean world long before it was neatly formulated in the Digest of Justinian. Its fundamental principle is stated in a chapter in the Digest headed *Lex Rodia de Jactu*: If goods are thrown overboard in order to lighten the ship, what is sacrificed for the common good should be made good by a common contribution. Dig. XIV, 2, 1 pr. See F. Sanborn, Origins of The Early English Maritime and Commercial Law 5, 14–16 (1930); R. Lowndes & G. Rudolph, The Law of General Average ¶¶ 1–3 (9th ed. 1964).[1] Today the principle covers a wide range of maritime losses, from damage done in quenching a shipboard fire to expenditures incurred in a port of refuge. General average concepts are not free floating maxims of admiralty law. They have been made subject to the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.

1. The ninth edition of Lowndes & Rudolph appears as volume 7 of British Shipping Laws (B. Hewson, ed. 1964).

§§ 1300–1315,[2] and the York/Antwerp Rules, modern codifications of Lex Rodia de Jactu, are typically incorporated in charter parties and bills of lading.

The plaintiffs-appellants sought general average contribution for damage sustained by the Orient Transporter in two different incidents—grounding in the Neches River, Texas, and destruction of the ship's high pressure turbine on the high seas. The district court held that under COGSA general average does not apply to the damage sustained by the Orient Transporter, because the damage was caused by unseaworthiness and the plaintiff shipowners[3] in neither instance exercised due diligence to make the ship seaworthy. The South Vietnamese interests, the defendants-appellees, counterclaimed for expenses incurred in unloading, storing, inspecting, fumigating, and reshipping the cargo after the Orient Transporter lost her propulsion system through the destruction of her high pressure turbine. In addition, they counterclaimed for recovery of a deposit paid as the cargo's general average share of the salvage expenses incurred in towing the Orient Transporter to Panama and then back to Beaumont, Texas, after the turbine damage. The district court held that the claim for unloading, inspecting, fumigating, storing, and reshipping expenses was barred by COGSA's one year statute of limitations. 46 U.S.C. § 1303(6). The court awarded the defendants-appellees $61,933.99 plus interest, as the deposit in the salvage action. We affirm.

I. FACTS

On April 15, 1970, Orient Mid-East Lines, Inc. contracted with the Commodity Credit Corporation of the United States Department of Agriculture, acting on behalf of the South

2. "Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter." 46 U.S.C. § 1300.

3. Astronato Cia. Nav. S.A. owned the Orient Transporter. Orient Mid-East Lines, Inc. owned all the stock of Astronato Cia. Nav. S.A.

Vietnamese Government, to transport 10,000 long tons of rice from the United States to Vietnam. The vessel to be used, the S.S. Orient Transporter, was warranted to be "tight, staunch, and strong, and in every way fitted for the voyage". The charter party incorporated COGSA[4] and contained a "Jason clause":

> In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which the carrier is not responsible by statute, contract or otherwise, the goods, consignees or owners of the goods shall contribute with the carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred in respect of the goods.

Any general average contribution was to be payable according to the York/Antwerp Rules, 1950.

The Orient Transporter took on a full cargo of rice at Mobile, Alabama, and Beaumont, Texas. At Mobile repairs were made to the starboard boiler. A surveyor from Lloyd's Register of Shipping noted on May 27, 1970, that the port boiler should undergo similar repairs "at the earliest opportunity, but not later than 7/70 (2mos)". Loading of rice continued at Beaumont and was completed on June 6, before the port boiler had been repaired. Because the port authority at Beaumont wanted to use the loading berth for another ship, the Master of the Orient Transporter took the ship, under the guidance of a pilot, to an abandoned ship channel in the Neches River where she was intentionally grounded on the soft silt bottom to permit repair work on the port boiler. The bottom of the Neches River proved an unsuitable anchorage, however, apparently because the main condenser and other piping was blocked by silt. With difficulty the ship was removed from the mud and silt. When the ship finally broke free, it moved rapidly backwards across

4. The bills of lading were also subject to COGSA. See note 2 *supra*.

the river. Because of poor communications between the Master and the engine room and a lack of power,[5] the ship did not reverse its direction until the stern barely avoided a dock and a cluster of pilings on the opposite side of the river. When the ship finally moved forward, it again traversed the channel and again grounded its bow in the mud and silt. It was then low tide, and the vessel could not free itself; the Master decided to wait until high tide the next morning. Before dawn the Master discharged 179 tons of fresh water. Later, at high tide, the vessel was floated with the aid of a tug boat and proceeded back to Beaumont for repairs. The Neches River episode resulted in expenses of $8,990.84.

After repairs were finally completed, the Orient Transporter sailed for Vietnam by way of the Panama Canal. At the time it left the pier on June 14, 1970, the ship's engine room crew was short at least one fireman, two oilers, and a wiper, but the wiper, one Fetaxidis, and an oiler were later returned to the ship by the police before the ship left American waters. In Fetaxidis's absence, he was signed off as a wiper and signed on as a fireman, a step up in the engine room hierarchy. Fetaxidis was 17 or 18 years old and had no record of formal or informal training as a fireman.[6]

A fireman shoulders considerably more responsibility than does a wiper. Testimony at trial established that a wiper's duties are essentially janitorial. A fireman, on the other hand, must know at all times the water level in the boilers. It is a vital task: too little water can result in an explosion; too much water can result in an overflow into the turbines which will destroy the turbine blades. The fireman also regulates

5. It is unclear what caused the lack of power. The appellants contend that the power was reduced because the condenser and other piping was filled with silt. The appellees imply that it was because of the "unfitness" of the power equipment, that is, the port boiler.

6. Fetaxidis did not testify. At the trial the plaintiffs' counsel reported that Fetaxidis had been killed in an explosion at sea.

the water level, by opening and closing feed lines. At the trial an expert testified that a fireman should always inform the engineer on watch if he has opened an extra feed line. Moreover, the expert stated that in a vessel such as the Orient Transporter, not equipped with an automatic watering device, a fireman should not open a feed valve without authorization from the engineer.

To check the water level in the boilers in the Orient Transporter, one looked at a vertical glass gauge approximately 15 inches long, similar to the transparent tube on the side of an electric coffee pot. The level in the gauge indicated the actual level in the boiler. So long as the water level in the boiler remained within the 15-inch limits of the gauge, the bow formed by the surface tension on top of the column of water was clearly visible through the glass. But if the water dipped below or rose above the level measured by the gauge, it was difficult to tell whether the gauge was full or empty, and thus whether the boiler contained too much or too little water. Testimony at trial established that when the water level cannot be seen through the gauge the proper procedure is to "blow down" the glass by draining the gauge and watching to see if water refills the glass. If it does, the water level is too high; if water does not refill the glass, the level is too low. Christopher Finley, Chief Engineer with Gulf Oil Corporation, testified that any competent fireman could blow down the water glass.

On June 21, 1970, at approximately 2110 hours Fetaxidis was on watch as fireman, and one Dimitrios Spetsiotis was the engineer on watch. Spetsiotis was in the lower engine room changing oil in the lube oil pump when Fetaxidis appeared and said that he could not determine the water level in the boiler; furthermore, he did not remember if, the last time he had checked, the water level was low or high. The two men returned to the fireman's station. They could not see the water level in the glass. Spetsiotis tried to blow down the glass, but he still could not ascertain whether the boiler

contained too much or too little water. Fearing an explosion, he turned on the boiler water feed pump and fed cold water directly into the boiler.[7] The results were catastrophic for the Orient Transporter. About a minute later loud noises came from the engine room, strong vibrations shook the vessel, and steam rose from the main engine. The water in the boiler, already high before Spetsiotis turned on the feed pump, had "carried over" into the turbines. The blades of the high pressure turbine were destroyed, and the turbine was rendered inoperative. Without notifying Spetsiotis, Fetaxidis had turned on an extra feed line. Damage to the propulsion system totalled $180,863.17.

The Orient Transporter was unable to proceed under her own power. A salvage tug brought the ship to the Panama Canal. It was there determined that a new turbine would be required. Because the turbine could not be supplied at the Panama Canal, the Orient Transporter was towed back to Beaumont. At Beaumont the cargo of rice was discharged, and arrangements were made to reship it to Vietnam aboard another vessel. Because of the cost and delay anticipated in procuring a new turbine, it was finally determined that repair of the Orient Transporter would be uneconomical. On October 1, 1970, she was sold for scrap.

II. THE CLAIMS FOR GENERAL AVERAGE CONTRIBUTION

[4] The plaintiff shipowners sued for contribution in general average for the damage to the Orient Transporter and for other expenses arising out of both the Neches River incident on June 6 and 7 and the destruction of the high pressure turbine on June 21. The district court found that the ship was unseaworthy in both instances and that the plaintiffs had

7. Usually water is fed first through a heater, where the water temperature is raised before the water enters the boiler. Because he was concerned to get water into the boiler as quickly as possible, Spetsiotis fed cold water directly into the boiler.

not established their due diligence to make the ship seaworthy. COGSA provides:

> (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
>
> (a) Make the ship seaworthy;
>
> (b) Properly man, equip, and supply the ship;
>
> (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

46 U.S.C. § 1303. If through lack of due diligence the carrier fails to provide a seaworthy ship, the carrier may not recover in general average for damage proximately caused by the unseaworthiness.

[5] The record in this case supports the court's finding that the Orient Transporter's port boiler was in an unseaworthy condition during the Neches River difficulties.[8] The surveyor from Lloyd's Register of Shipping had noted in Mobile that the boiler should be repaired "at the earliest opportunity". Furthermore, another surveyor, who had examined the Orient Transporter after the Neches River incident, testified that without the boiler repairs the vessel was unseaworthy. The Master had apparently intended to repair the boiler during loading at Beaumont, but, for reasons not clear, repairs

8. Only two witnesses testified at the trial concerning the events of the voyage. These witnesses were two pilots, one who had taken the ship from Beaumont to the abandoned channel in the Neches River on June 6, 1970, and one who had returned the ship to Beaumont on June 7. Much of the other testimony was presented in the form of depositions. We are in as good a position to evaluate such evidence as was the trial court. J. Gerber & Co. v. S.S. Sabine Howaldt, 2 Cir. 1971, 437 F.2d 580, 586. The proper standard of review in such a case is a modified "clearly erroneous" standard. "[A]lthough we are bound by the clearly erroneous doctrine . . ., it is subject to the modification that it does not apply with equal force, where . . . the appellate court is in as good a position as the lower court to evaluate the testimony that is crucial to the case". Caradelis v. Refineria Panama, S.A., 5 Cir. 1967, 384 F.2d 589, 593; San Pedro Compania Armadoras, S.A. v. Yannacopoulos, 5 Cir. 1966, 357 F.2d 737, 740.

had not been accomplished by the time that loading was completed. The soft silt bottom of the abandoned channel of the Neches River was clearly intended as an anchorage where the final preparations to make the vessel seaworthy for the voyage could be carried out. It was this attempt to make the ship seaworthy which precipitated the damage and loss caused by the subsequent attempts to float the ship free.

[6] When unseaworthiness of the vessel has been proved, the carrier may nonetheless avoid the adverse consequences that would otherwise flow by showing that it exercised due diligence to make the ship seaworthy before the incident. 46 U.S.C. § 1304. The appellant made little attempt to offer proof on this point at the trial below. In fact, such a showing could hardly have been made; it was during an attempt to make the ship seaworthy that the damage and loss for which general average contribution is sought occurred.

[7, 8] Recovery is foreclosed here by more than the unseaworthiness of the vessel; the damage and loss complained of does not in any event warrant general average contribution. General average concepts apply only to action taken for the common safety when the ship and its cargo are in peril. Star of Hope, 1869, 76 U.S. (9 Wall.) 203, 19 L.Ed. 638; Columbian Ins. Co. v. Ashby & Stribling, 38 U.S. (13 Pet.) 331, 10 L.Ed. 186; Nicaraguan Long Leaf Pine Lumber Co. v. Moody, 5 Cir. 1954, 211 F.2d 715, 717. We reject the appellants' contention that the York/Antwerp Rules, 1950, incorporated into the charter party in the instant case, have done away with this requirement.

[9] First, the York/Antwerp Rules were intended to achieve international uniformity in the adjustment of general average, not to create a new species of general average act. See L. Buglass, General Average & The York/Antwerp Rules, 1950, at 7 (1959); Lowndes & Rudolph, *supra*, ¶¶ 225, 290–291. Second, general average act is defined in the rules as "any extraordinary sacrifice or expenditure . . . intentionally and reasonably made or incurred for the common safety for

the purpose of preserving from peril the property involved in a common maritime adventure." York/Antwerp Rules, 1950, Rule A.[9] It is true, as the appellants point out, that the lettered rules are intended to provide guidance only where the numbered rules do not apply.[10] But we are not persuaded that any numbered rules do away with the requirement that the ship be in a position of peril before the law of general average applies. Rules X and XI, on which the appellants rely, concern expenses incurred at a port of refuge entered as a general average act. Lowndes & Rudolph, *supra*, ¶ 652. Those rules are not applicable to the present situation. Furthermore, even Rules X and XI are limited to actions taken "for the common safety", a phrase closely related to removal from peril.[11] Finally, it would appear that the plaintiffs' interpretation of the York/Antwerp Rules would run afoul of sections 3(8) and 5 of COGSA, 46 U.S.C. §§ 1303(8) & 1305.[12]

9. The York/Antwerp Rules, 1950, may be found in 6 Benedict on Admiralty (7 ed. Knauth ed. 1969); Buglass, *supra*; Lowndes & Rudolph, *supra*.

10. "Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules." York/Antwerp Rules, 1950, Rule of Interpretation.

11. Lowndes & Rudolph, *supra*, describe the phrase "for the common safety" as a "shorter and more convenient phrase than 'for the purpose of preserving from peril the property involved in a common maritime adventure.'" *Id.* at ¶ 556. They also note:

> No one at the [Stockholm] Conference [of 1924] . . . expressed any desire to widen the definition of general average so as to include in its scope losses or expenses other than those arising from an intention to save the common adventure from a common peril. In the end not only were the words "for the common safety" inserted in the definition, but the principle implied by these words was further emphasized by continuing with the phrase *"for the purpose of preserving from peril* the property involved in a common maritime adventure."

Id. at ¶ 550 (emphasis Lowndes & Rudolph).

12. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in

See G. Gilmore & C. Black, The Law of Admiralty § 5–13 (1957).

The district court found that the Orient Transporter was not in a position of peril when resting on the bottom of the Neches River. The facts support this finding. The vessel was far removed from any danger of collision with another ship, and did not interfere in any way with navigation. The pilot who moved the Orient Transporter from Beaumont to the Neches anchorage testified that the ship would not have been disturbed by heavy weather. Finally, the decision to ground the ship is persuasive evidence that the soft silt bottom in the abandoned ship channel was considered a safe anchorage. We cannot say that the district court erred in finding that this anchorage was safe.[13]

[10] We turn to the destruction of the high pressure turbine on June 21, 1970. The district court found that the vessel was unseaworthy: the fireman, Fetaxidis, was inexperienced; the engine room was inadequately manned; and the ship lacked proper equipment. In addition, the court found that the owners did not use due diligence to make the vessel fit prior to the voyage and that this failure caused the accident on June 21.[14] Apparently conceding a lack of dili-

favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.
46 U.S.C. § 1303(8).
Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.
Id. § 1305.

13. The Master stated that he decided to jettison 179 tons of fresh water to ease the floating of the ship "[d]ue to the reason of safety of the vessel and goods". Although evidence that the ship was in a position of peril, the statement is not conclusive. See Ravenscroft v. United States, E.D.N.Y.1936, A.M.C. 696, aff'd, 88 F.2d 418, 2 Cir., cert. denied, 301 U.S. 707, 57 S.Ct. 940, 81 L.Ed. 1361. Significantly, the Master jettisoned the water before he knew whether the tide would float the ship, fresh water and all.

14. We harbor some doubts as to whether the damage to the high pressure turbine was the result of a general average act under the York/Antwerp Rules, 1950. The parties do not argue the point,

gence,[15] the appellants concentrate their argument on the court's findings of unseaworthiness and causation.

[11, 12] An inadequate crew, of course, may create an unseaworthy condition. Waldron v. Moore-McCormack Lines, 1967, 386 U.S. 724, 727, 87 S.Ct. 1410, 18 L.Ed.2d 482; Aguirre v. Citizens Casualty Co., 5 Cir. 1971, 441 F.2d 141, 144, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58; Dillon v. M. S. Oriental Inventor, 5 Cir. 1970, 426 F.2d 977, 979, cert. denied, 400 U.S. 903, 91 S.Ct. 140, 27 L.Ed.2d 140. An inadequate crew may be due either to insufficient manning, see, e. g. June T., Inc. v. King, 5 Cir. 1961, 290 F.2d 404, 407, or to an incompetent crew, see e. g., Horn v. Cia de Navigacion Fruco, S.A., 5 Cir. 1968, 404 F.2d 422, cert. denied, 394 U.S. 943, 89 S.Ct. 1272, 22 L.Ed.2d 477; The Vale Royal, D.Md.1943, 51 F.Supp. 412, 426. Here there was convincing evidence of both. Fetaxidis had no experience or training as a fireman. There was testimony at trial that to obtain the status of a certified fireman water-tender, one must have six months experience at sea in the engine department of a merchant vessel and must pass a Coast Guard examination; the National Maritime Union gives an eight to ten week course in preparation for this examination. There was no evidence that Fetaxidis met any of these criteria. Moreover, his incompetence was actively demonstrated. By going to Spetsiotis, Fetaxidis invited the inference that he did not know how to "blow down" the water glass himself. More importantly, apparently he did not appreciate the necessity of knowing the water level at all times, of keeping the engineer on watch informed as to what feed lines were open, and indeed, of not

however, and because of our disposition of the case we need not face the issue.

15. Charles Walker, a patrolman for the National Maritime Union, stated that in June 1970 there were twenty-five certified firemen water-tenders in the area available for shipping. He testified that on request he could have obtained a certified fireman water-tender for the Orient Transporter in "probably two hours".

opening feed lines without the engineer's permission. The evidence clearly established Fetaxidis's incompetence.

[13] The inexperience of a crew member does not, of course, necessarily create an unseaworthy condition. Properly supervised, an inexperienced, untrained individual may learn to become competent. Cf. The New York Marine, 2 Cir. 1940, 109 F.2d 564, 565. On the Orient Transporter, however, Fetaxidis's inexperience and ignorance of his job were compounded by a shortage of personnel. The engine department was understaffed by at least one oiler on June 21, and the inference is persuasive that there was no oiler on watch when the accident occurred. When Fetaxidis reported to Spetsiotis, the engineer on watch, that the water level could not be seen in the glass, Spetsiotis was in the lower engine room changing oil in the oil lube pump—a task usually performed by an oiler. And in Spetsiotis's deposition testimony concerning the events of June 21, there is no mention of an oiler on duty. Although it is possible that the incompetence of the fireman or the lack of an oiler might not, standing alone, have had significant adverse consequences, combined they amounted to an inadequate crew and an unseaworthy condition.

[14] The unseaworthiness was exacerbated by primitive boiler-related equipment. The Orient Transporter had no automatic feed equipment, remote level indicators, or automatic alarm system—any one of which might have prevented the accident.[16] Without such equipment, it was especially important that the ship be adequately manned. In conclusion, we note that seaworthiness is a question of fact. Aguirre v. Citizens Casualty Co., 441 F.2d at 144. The facts, as we read the record, lead us to the conclusion that the district court's findings were not erroneous.

16. All of this equipment is common. Christopher Finley, who had served 26 years as Chief Engineer, testified that he had never served on a ship that did not have remote level indicators and alarm systems.

[15, 16] The appellants' final contention is tied to the different liabilities under COGSA when damage results from unseaworthiness and when it results from negligent management of the vessel. Under COGSA the carrier is not liable for loss or damage to the cargo resulting from negligent management. 46 U.S.C. § 1304(2)(a). Conversely, negligent management will not foreclose a general average recovery by the ship owner, as will unseaworthiness.[17] The appellants argue that the destruction of the boilers resulted from Spetsiotis's negligence, not from any unseaworthy condition. After all, it was Spetsiotis's turning on the feed pump which formed the immediate cause of the carryover of water from the boiler into the turbine. And there was testimony that when there is doubt as to whether the water is too high or too low in a boiler, the proper procedure is to "shut down" the boiler and stop the main engine. Instead, Spetsiotis took the worst action that he could have taken under the circumstances, as we now know them: he added cold water directly into the boiler.

That Spetsiotis's action formed the immediate cause of the accident, however, does not reduce the significance of the inadequacies of the engine room crew. Fetaxidis's incompetence and the lack of an oiler set events in motion that led

17. The effect of the combination of the new Jason Clause and the Carriage of Goods by Sea Act is that once a general average act within "traditional bounds" is established, cargo will be required to contribute in general average even if the general average loss is due to a cause, such as an error in navigation attributable as negligence to the carrier, if it is determined that the carrier would not be responsible to cargo under the Act for loss resulting from such cause. The ultimate inquiry in this regard, therefore, concerns whether or not the carrier is entitled to the benefit of one or more of the exemptions from responsibility provided in the Act. Thus, the ship's right to recover general average contribution from cargo in this case presents precisely the same question as would be involved if cargo were herein seeking to hold the ship liable for damage to cargo's goods.
Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co., 274 F.Supp. at 901-902 (footnotes omitted). And see Gilmore & Black, *supra*, § 5-13.

directly to a crisis situation for the engineer on watch. In an atmosphere of danger created by the possibility of an imminent boiler explosion, Spetsiotis panicked. But for the unseaworthiness there would have been no crisis and no accident. The unseaworthiness was a "substantial factor" in the accident. See Restatement (Second) of Torts §§ 431, 433 (1965); W. Prosser, Law of Torts § 41 (1971). It formed a crucial link in the chain of causation, continued not broken by the response of Spetsiotis.

[17–19] At best the appellants showed that Spetsiotis's action, and perhaps negligence, was a concurrent cause of the catastrophe. This is insufficient to establish a right of recovery here. When there is more than one effective cause, the fact that one cause is excepted under COGSA does not eliminate the carrier's responsibility for unseaworthiness. Hydaburg Cooperative Ass'n v. Alaska Steamship Co., 9 Cir. 1968, 404 F.2d 151, 153; Union Carbide & Carbon Corp. v. The Walter Raleigh, S.D.N.Y.1951, 109 F.Supp. 781, 793, aff'd, 200 F.2d 908, 2 Cir.; Gilmore & Black, *supra*, § 3–38. We have held that the burden of showing that damage is due to a cause other than unseaworthiness falls on the shipowner. Horn v. Cia de Navigacion Fruco, S.A., 404 F.2d at 432; Cooper v. Pinedo, 5 Cir. 1954, 212 F.2d 137, 143. Furthermore, when there are concurring causes, the burden is on the shipowner to show how much of the damage resulted from a cause entitled to exemption under COGSA. J. Gerber & Co. v. S.S. Sabine Howaldt, 2 Cir. 1971, 437 F.2d 580, 588; Lekas & Drivas, Inc. v. Goulandris, 2 Cir. 1962, 306 F.2d 426, 431–432; American Mail Line, Ltd. v. Tokyo Marine & Fire Ins. Co., 9 Cir. 1959, 270 F.2d 499, 502. Because the appellants have not met these burdens, they must bear the entire loss.

III. THE COUNTERCLAIM

In their counterclaim the Vietnamese interests sued for reimbursement of a deposit made as their general average share of salvage costs, and to recover expenditures of more

than $100,000 incurred in loading, inspecting, fumigating, storing, and reshipping the rice after the Orient Transporter's propulsion system was rendered inoperative by the events of June 21, 1970.[18] The Vietnamese also claimed an additional $4,000, the value of some 581 bags of rice lost or ruined during transfer. Recovery hinges on the applicability of section 3(6) of COGSA, 46 U.S.C. § 1303(6), which provides: "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered". We agree with the district court that the cross-appellants are entitled to recover the salvage deposit and that their other claims are barred under COGSA's one year statute of limitations.

The relevant sequence of events, as it appears from the record, is as follows. Towed back to Beaumont after losing its propulsion system, the Orient Transporter arrived on August 7, 1970. While the ship was being unloaded on August 24 the plaintiffs filed their action in rem against the cargo of rice, seeking general average contribution. The unloading of the Orient Transporter was completed on August 27. It was not until February 3, 1972, almost eighteen months after the Orient Transporter had discharged her cargo, that the defendants filed any pleadings in this case. At that time they reserved the right to file a counterclaim at a later date; they did so on September 11, 1972. Apparently conceding that if the one year statute of limitations is applicable to this case

18. These expenses may be broken down as follows:

Unloading	$62,582.01
Inspection	1,123.40
Fumigation	9,329.00
Storage	26,895.56
Reshipment	513.00
	$100,442.97

their claims are barred, the defendants argue that the statute does not apply.

[20] We agree that the one year limit does not apply to the claim for reimbursement of the salvage deposit. In States Steamship Co. v. American Smelting & Refining Co., 9 Cir. 1964, 339 F.2d 66, cert. denied, 380 U.S. 964, 85 S.Ct. 1109, 14 L.Ed.2d 155, the court faced a situation similar to that before us now: more than a year after the cargo was delivered, the cargo owner sued for reimbursement of its general average portion of a salvage award. The court held that the action was in actuality for idemnification and that as such was not a claim for "loss or damage" within the meaning of COGSA; therefore the one year limitation period did not apply. Because the salvage award in the case was not final until more than a year after delivery, the plaintiff could not have brought its claim within the one year period.[19] The Court noted that in the usual action for damage to cargo, it is at the time of delivery that the shipper should become aware of any damage. With indemnity, however, the cause of action accrues only upon actual payment. 339 F.2d at 69–70. We adopt this analysis and hold that the salvage claim is not barred by the one year limitation period of COGSA.

The defendants-cross-appellants urge us to extend the rationale of *States Steamship* to their action to recover expenses and losses borne after the disabled Orient Transporter was towed back to Beaumont. They maintain that, like the plaintiff in *States Steamship,* they could not have raised their claims within the one year period. We are unconvinced. The record in this case does not indicate that the defendants' causes of action arose after the one year period expired.[20]

19. The cargo was delivered on February 11, 1957. On October 28, 1958, the salvage award became final. On March 16, 1959, the owner of the cargo filed a libel to recover its portion of the salvage paid.

20. After the Orient Transporter arrived in Beaumont on August 7, 1970, its cargo was attached by a United States Marshal pursuant to an action in rem for salvage brought by the owners of the tug boat

Moreover, we are of the view that the claims brought in this action are the sort intended to be included within the COGSA time limit. The damaged and missing rice was discoverable during the unloading of the Orient Transporter. This is the typical "damage or loss" covered by the limitation period of COGSA. All of the expenses for unloading, inspection, fumigation, and storage were incurred within two months of time the rice was discharged. And the costs of reshipment were also incurred within the year. These expenses too are cargo-related and covered by the limitation period.

We note that the federal courts have with consistency strictly applied the one year period when the cause of action arose within a year from delivery. See, e. g., American Oil Co. v. Steamship Ionian Challenger, 2 Cir. 1966, 366 F.2d 509; Minex v. International Trading Co., E.D.Va.1969, 303 F.Supp. 205. We find no reason to depart from this accepted practice in this case.

Affirmed.

that towed the ship back to Beaumont. The United States Department of Agriculture undertook for the Government of Vietnam to bear responsibility for the amount of the salvage award, and the seizure was lifted. Through its agency, the Commodity Credit Corporation, the Agriculture Department oversaw and financed the unloading, fumigation, inspection and storage of the rice, and arranged for another charter so that the cargo could ultimately reach its destination. By March 31, 1971, the Government of Vietnam had reimbursed the Agriculture Department for all of these expenses. The Government of Vietnam also paid 90 percent of the freight to the Commodity Credit Corporation on February 2, 1971.

APPENDIX C

Judgment of the Court of Appeals.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2096

D. C. Docket No. CA-6830

ORIENT MID-EAST LINES, INC. and ASTRONATO CIA. NAV. S.A. As interest may appear,

Plaintiffs-Appellants-Cross Appellees,

versus

A SHIPMENT OF RICE NOW OR LATELY ON BOARD THE SS ORIENT TRANSPORTER, *In Rem*,

and

THE REPUBLIC OF VIETNAM, TONG CUOC TIEP TE (General Supply Agency) and CONG-TY BAO HIEM TAI BOA HIEM VIETNAM,

Defendants-Appellees-Cross Appellants.

Appeal from the United States District Court for the Eastern District of Texas

Before

RIVES, WISDOM and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants-cross appellees pay to defendants-appellees-cross appellants, the costs on appeal to be taxed by the Clerk of this Court.

June 27, 1974

Issued as Mandate:

APPENDIX D

Order Denying Petition for Rehearing.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-2096

ORIENT MID-EAST LINES, INC. and ASTRONATO CIA. NAV. S.A. As interest may appear,

Plaintiffs-Appellants-Cross Appellees,

versus

A SHIPMENT OF RICE NOW OR LATELY ON BOARD THE SS ORIENT TRANSPORTER, *In Rem*,

and

THE REPUBLIC OF VIETNAM, TONG CUOC TIEP TE (General Supply Agency) and CONG-TY BAO HIEM TAI BOA HIEM VIETNAM,

Defendants-Appellees-Cross Appellants.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING

November 19, 1974

Before RIVES, WISDOM and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

SUPREME COURT, U. S.
Supreme Court, E
MAR 13 1
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1013

ORIENT MID-EAST LINES, INC, and ASTRONATO CIA NAV. S.A.,

Petitioners,

against

A SHIPMENT OF RICE NOW OR LATELY ON BOARD THE SS ORIENT TRANSPORTER,

and

THE REPUBLIC OF VIETNAM, TONG CUOC TIEP TE (General Supply Agency) and CONG-TY BAO HIEM TAI BAO HIEM VIETNAM,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Counter Statement of the Case	2
Reasons Why the Petition Should Be Denied	6
1. The Decisions Below Resulted from the Particular Facts Proved at the Trial	6
2. There Is No Conflict Among the Circuits on the Key Issue: the Petitioners Failed to Use Due Diligence to Make the *Orient Transporter* Seaworthy	7
Conclusion	10

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Cases:

Director General of India Supply Mission v. S/S Maru, 459 F.2d 1370 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973)	9
Firestone Synthetic Fibers Co. v. M/S Black Heron, 324 F.2d 835 (2d Cir. 1963)	9
Horn v. Cia de Navegacion Fruco, S.A., 404 F.2d 422 (5th Cir., 1968), *cert. denied*, 394 U.S. 943 (1969)	9
Wilbur-Ellis Co. v. M. V. Captayannis S., 306 F. Supp. 866 (D.Ore. 1969), *aff'd*, 451 F.2d 973 (9th Cir. 1971), *cert. denied*, 405 U.S. 923 (1972)	9

Statutes:

United States Carriage of Goods by Sea Act, Title 46, U.S. Code §1304(1)	2, 7
§1304(2)(a)	2, 8, 9

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1013

ORIENT MID-EAST LINES, INC, and ASTRONATO CIA NAV. S.A.,

Petitioners,

against

A SHIPMENT OF RICE NOW OR LATELY ON BOARD THE SS ORIENT TRANSPORTER,

and

THE REPUBLIC OF VIETNAM, TONG CUOC TIEP TE (General Supply Agency) and CONG-TY BAO HIEM TAI BAO HIEM VIETNAM,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Questions Presented

Where the evidence at trial established: that the SS ORIENT TRANSPORTER lacked customary safety equip-

ment necessary to determine the water level in the boilers and to prevent explosions; that the engine room crew was undermanned; and that an inexperienced and incompetent young boy was unable to perform his duties as a fireman leading to a destruction of the propulsion equipment of the vessel, should this Court issue a writ of certiorari to the Fifth Circuit Court of Appeals to review its decision that the owner had failed to use due diligence to make the vessel seaworthy and that the unseaworthy conditions caused the loss? The petition also asserts that the Court of Appeals erred in finding that there were concurrent causes of the loss in this case and further erred in holding that the vessel was unseaworthy at the commencement of the voyage.

Essentially, petitioners claim that they should be exonerated from liability by reason of negligence in management of the vessel pursuant to the provisions of the United States Carriage of Goods by Sea Act, Title 46, U.S. Code §§1304 (1) and (2)(a). It is respondents' position that petitioners failed to establish a right to exoneration under that statute and that the District and Circuit Courts were correct in holding (1) that petitioners, the vessel owners, failed to use due diligence in making the vessel seaworthy prior to the commencement of the voyage and (2) that the unseaworthy conditions led directly to the loss in this case.

Counter Statement of the Case

The SS ORIENT TRANSPORTER was chartered by the Commodity Credit Corporation on behalf of the Government of Vietnam to carry rice from ports located on the Gulf of Mexico to Saigon. The vessel, laden with respondents'

cargo of rice, sailed from Beaumont, Texas destined for Vietnam on June 14, 1970. When it left the dock in Beaumont, the ship's engine room crew was shorthanded because at least one fireman, two oilers and a wiper had jumped ship. The absence of these crew members had been reported to the police. The wiper, Fetaxides, and an oiler were returned by the police after the ship left Beaumont but before the ship cleared American waters. Due to the shortage of a fireman, upon his return from his absence without leave, Fetaxides found that he had been promoted in absentia from wiper to fireman. A wiper performs janitorial functions in connection with the engine room but a fireman has a more responsible position. He must know at all times the water level in the boilers. Too little water can result in an explosion. Too much water can damage the propulsion system. The fireman regulates the water level by opening and closing feed lines. The water level in a boiler is indicated by a vertical glass gauge located alongside the boiler. A competent fireman who does not see a water level indicated on the gauge should be able to determine whether there is too much or too little water in the boiler by "blowing down" the gauge. This requires draining it by opening a valve and watching as the water refills the glass. If the glass tube fills up to the top the water level is too high. If water fails to appear at the bottom of the glass or just barely appears, additional water is needed.

On June 21, 1970, one week after leaving Beaumont en route to Saigon, Fetaxides, who was on duty as the fireman in the engine room, reported to the engineering officer in charge of the watch, Second Engineer Spetsiotis,

that he had lost track of the water level in the gauge and could not determine the amount of water in the boilers. Spetsiotis had been working on a lube pump in a remote section of the engine room from which position he could not observe the boiler gauge. He went immediately with Fetaxides and attempted to determine the water level by blowing down the gauge. Spetsiotis, however, was unable to determine immediately whether he had too much or too little water in the boilers. Fearful of an explosion if there were too little water, he inserted cold water directly into the system without passing it through the heater normally used to pre-heat the water before it goes into the boiler. Since in fact there was too much water in the system, the cold water added by Spetsiotis overflowed into machinery that was extremely hot. The result was thermal shock and fundamental damage to the propulsion system of the vessel. Because of the vibration and loud noise coming from the machinery, Spetsiotis turned off the power and the ship drifted until ultimately rescued by a tug summoned by the owners.

There were no remote control indicators or warning devices installed on the SS ORIENT TRANSPORTER to indicate water levels in the boilers although they are in common use on other vessels.

There were fully qualified firemen available for hiring in the Beaumont vicinity prior to the sailing of the vessel but no attempt was made to hire one to replace the fireman who had deserted.

Fetaxides did not testify at the trial nor by deposition since he was killed in a subsequent explosion at sea. The

second engineer, Spetsiotis, testified by deposition. Consequently Spetsiotis' description of the events in the engine room immediately prior to the casualty is the only one available. He testified that Fetaxides had opened an extra feed line without advising him and had forgotten about it. Consequently, when Spetsiotis was unable to obtain a reading on the water gauge he assumed, being unaware that the feed line had been opened, that the water level was low and that an explosion might be imminent. He further testified as follows:

> "Q. Did you ask the fireman why he opened the extra feed line? A. Yes. I asked him, and I asked him why, and why, and asked him why he did not report it to me. And I almost kick him.
>
> Q. What did the fireman say? A. He didn't reply at all.
>
> Q. He made no explanation as to why he opened the extra feed line? A. He was young, an unexperienced boy, and apparently he opened and he forgot. He opened and he forgot about it.
>
> Q. How old was this man? How old was the fireman? A. I am not exactly—I do not exactly recall, but he should be between seventeen or eighteen years old."

Respondents presented expert testimony to the effect that a ship with no more equipment than existed on the ORIENT TRANSPORTER to determine the water level was dangerous and that putting an untrained man in a situation where he would work with deficient equipment added to the danger. Finally, a qualified chief engineer with many years experience testified that a fireman who did not advise the engineering officer when he opened the feed valve and who could not determine the water level on the gauge was clearly incompetent.

The petitioners brought suit in admiralty for general average under which the preponderance of all loss sustained would be borne by the cargo interests, the respondents.

The District Court, after a trial, concluded that on June 21, 1970 the ORIENT TRANSPORTER was unseaworthy because it was not properly manned and equipped, these conditions caused the loss complained of, and that the owners had failed to use due diligence to make the ship seaworthy prior to its departure from Beaumont. The Circuit Court affirmed.

Reasons Why the Petition Should Be Denied

1. The Decisions Below Resulted from the Particular Facts Proved at the Trial.

Petitioners do not press it here but there was an additional claim for general average based on damages sustained by the ORIENT TRANSPORTER a few days before she sailed from Beaumont. This other claim, on which they also lost as discussed in the decisions below, gives some general indications of the poor quality of the ship, its crew and its officers.

With respect to the present claim, the facts show that four crew members assigned to the engine room jumped ship prior to sailing, two of whom, including the wiper, Fetaxides, a 17 or 18 year old boy, were returned by police before the ship cleared American waters. The engine room equipment was antiquated, inadequate and unsafe. The crew was short handed and at the critical moment, Fetaxides, the wiper hastily promoted to fireman, proved totally incompetent to perform his new but critical duties.

When he opened a water feed line and forgot about it he put the ship in peril. The second engineer, under emergency conditions, chose to risk thermal shock by an overflow of cold water rather than destruction of the ship and its crew by a boiler explosion.

On this record the courts below properly concluded (1) that the owners had failed to use due diligence to make the vessel seaworthy, (2) that the vessel was not properly manned or equipped, and (3) that these deficiencies caused the loss. These findings can lead only to a decision for respondents' consistent with the provisions of 46 U.S.C. §1304(1) which provides that "the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section."

2. There Is No Conflict Among the Circuits on the Key Issue: the Petitioners Failed to Use Due Diligence to Make the *Orient Transporter* Seaworthy.

Upon the trial respondents did not rest on the statutory allocation of the burden of proof but rather they assumed the burden of proving (1) the ORIENT TRANSPORTER was unseaworthy because it was improperly manned and equipped, (2) the unseaworthy condition resulted in the loss, and (3) the owners failed to use due diligence to make the vessel seaworthy. Petitioners showed affirmatively that Fetaxides, the youthful wiper promoted to fireman, was incompetent. The ship's log extracts showed the ship was undermanned in the engine room crew. Expert witnesses testified that safety devices were available and in common use which could have prevented the casualty but were not

installed on the ORIENT TRANSPORTER. And finally respondents proved that qualified firemen were available in the Beaumont area to replace the deserter but the owners made no attempt to hire a replacement.

Petitioners based virtually their entire defense on their contention that the negligence of Spetsiotis, the Second Engineer, was the sole cause of the loss and consequently they should be exonerated from all liability under the provisions of 46 U.S.C. §1304(2)(a) which provides: "(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship * * *"

The courts below concluded on the facts proved at trial that petitioners' theory was wrong—the incompetence of Fetaxides as well as the lack of readily available safety devices were the basic causes of the disaster.

Petitioners assert that there is a conflict among the circuit courts which needs to be resolved. They ask whether the carrier "must go further after proving that the loss was caused by an error in management on the part of one of the crew members and prove that the loss could not have been caused by the unseaworthiness of the vessel." (Petition p. 6). This assumes a key point was established when in fact it was not. Petitioners failed to prove that the loss was caused by the negligence of Spetsiotis. Respondents affirmatively showed the vessel was unseaworthy because of the lack of a full crew, the incompetence of Fetaxides and the lack of appropriate safety devices and that these

factors led to the loss. The Circuit Court considered petitioners' contentions below and concluded: "At best the appellants showed that Spetsiotis' action, and perhaps negligence, was a concurrent cause of the catastrophe." (A 35).

Petitioners claim to see a difference among the Fifth, Second and Ninth Circuits on the question of burden of proof under these circumstances and ask this Court to compare *Horn* v. *Cia de Navegacion Fruco, S.A.*, 404 F.2d 422 (5th Cir., 1968), *cert. denied*, 394 U.S. 943 (1969), cited as authority by the court below, with *Firestone Synthetic Fibers Co.* v. *M/S Black Heron*, 324 F.2d 835 (2d Cir. 1963); *Director General of India Supply Mission* v. *S/S Maru*, 459 F.2d 1370 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973); and *Wilbur-Ellis Co.* v. *M.V. Captayannis S.*, 306 F. Supp. 866 (D.Ore. 1969), *aff'd*, 451 F.2d 973 (9th Cir. 1971), *cert. denied*, 405 U.S. 923 (1972).

There is no conflict. Each Circuit agrees that if the Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(a), is applicable, as it is here, a carrier can be exonerated from liability upon proof that the loss was caused by an error in management of the vessel even though the ship may have been unseaworthy. This is exactly the point where petitioners failed. The courts below concluded that the cause of the loss was not mismanagement or negligence but rather the unseaworthy conditions proven by respondents. This makes all the difference.

In essence petitioners simply would like to have one more review of the evidence but there are no legal issues presented which warrant a review by this Court. The Fifth Circuit reviewed the evidence and affirmed the decision of the trial court. Upon petitioners' petition for a rehear-

ing, the Circuit Court again reviewed the evidence and adhered to its prior decision. Petitioners' final efforts here should be rejected. Their case meets none of the customary criteria for the grant of a writ of certiorari.

Conclusion

The Petition for a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals should be denied.

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March 13, 1975